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In the Supreme Court

of the

United States

OCTOBER TERM, 1967

No. 1080

HEWLETT-PACKARD COMPANY, a corporation; DAVID PACKARD; and WILFRED F. CAVIER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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vs.

United States of America,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Hewlett-Packard Company, David Packard and Wilfred F. Cavier (herein collectively referred to as "Petitioner") pray that a writ of certiorari issue to review the judgment entered in this case on November 15, 1967, by the United States Court of Appeals for the Ninth Circuit, which affirmed the judgment of the United States District Court for the Northern District of California, Southern Division, entered June 29, 1967.

OPINIONS BELOW

The District Court filed no opinion in this case. Its Order and Judgment (R. 141-143)[1] is printed herein in Appendix B, *infra,* at pp. 8-11. The opinion of the Court of Appeals (R. 154-160), printed in Appendix B, *infra,* at pp. 12-18 is reported at ..... F.2d ..... (November 15, 1967).

JURISDICTION

The Judgment of the Court of Appeals was rendered and entered on November 15, 1967 (R. 161). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether under the provisions of 10 U.S.C. § 2313(b) the United States, after entering into firm fixed-price contracts for standard commercial articles pursuant to regular procurement procedures by which the United States did not consider or rely in any way upon costs or estimated costs of production, is nevertheless entitled subsequent to performance of the contracts to examine all books and records of the contractor relating to the cost of producing the contract items.

2. Whether a contractor who has entered into a firm fixed-price contract for standard commercial articles with the United States by which the contracting parties have agreed that cost of production data is not applicable to the contract can be compelled after the contract has been performed to permit the United States to examine his records disclosing the cost of producing the contract items.

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1. References herein are to Volume I of the Record in this Court. Pages 1-150 of Volume I and Volume II comprise the Clerk's Transcript from the District Court. Pages 151-162 of Volume I comprise the Transcript of Proceedings in the Court of Appeals.

3. Whether the court below erred in holding that the word "contract" as used in 10 U.S.C. § 2313(b) does not mean the specific agreement between the parties but has a broad meaning embracing the general subject matter of the procurement of described property by the United States.

STATUTES AND REGULATIONS INVOLVED

This case involves an interpretation of 10 U.S.C. § 2313 (b), which provides:

> (b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.[2]

The case also involves 10 U.S.C. § 2306(f), 18 U.S.C. § 1905 and §§ 1-201.6, 3-403, 3-403.1 and 7-104.15 of the Armed Services Procurement Regulation (as the same were in effect when the contracts here involved were executed), all of which are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

Hewlett-Packard Company[3] is, and for many years has been, a manufacturer of electronic test and measurement equipment designed for general use where great precision in measurement is required. This proceeding involves a controversy between the Comptroller General of the United States of America and Hewlett-Packard as to the meaning and application of a contract provision for examination of

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2. Section 2313 is set forth in full at pp. 1-2 of Appendix A.

3. Sometimes hereinafter referred to as "Hewlett-Packard".

books and records of the contractor inserted pursuant to the mandate of 10 U.S.C. § 2313(b) in four negotiated firm fixed-price contracts for electronic test and measurement equipment which were awarded to Hewlett-Packard by the Air Force during the period from March, 1959 to January, 1961 (R. 20-21). The items covered by the contracts were all standard commercial items listed in the Company's catalog at established prices, some of which had been in effect for many years. The contract prices were negotiated on the basis of listed catalog prices, less a volume discount, pursuant to regular Armed Services Procurement procedures then authorizing this type of negotiation, in the course of which the United States did not consider or rely in any way upon costs or estimated costs of production (R. 22-23A). The procurement procedures contemplated that the United States would rely, and it did in fact rely, on the disciplines of the commercial market place to establish reasonable contract prices and the fixed prices so established were not subject to any subsequent adjustment (R. 22-23).

Pursuant to the statutory mandate of 10 U.S.C. § 2313, each of the four contracts contained among its general provisions a "Clause 10" reading as follows:

> 10. Examination of Records
>
> (The following clause is applicable if the amount of this contract exceeds $1,000 and was entered into by means of negotiation, but is not applicable if this contract was entered into by means of formal advertising.)
>
> (a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

> (b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding $1,000 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

In September, 1962, representatives of the Comptroller General, purporting to exercise rights accorded by Clause 10 of these contracts, commenced an examination of the books and records of Hewlett-Packard relating to these four contracts. During the course of this examination, the Company permitted access to books and records relating to sales prices of various instruments and parts (R. 23A). On November 14, 1962, a representative of the Comptroller General requested "all books, documents, papers or records relating to the pricing and cost of performance, support for prices charged to the government, and such other necessary information which would permit such representatives to review the reasonableness of the contract prices provided for in the aforesaid contracts." This request was refused by Hewlett-Packard on the ground that cost of production information was not directly pertinent to these contracts (R. 4, 23A). The United States then brought this action to enforce the government's asserted right of examination, seeking both declaratory and injunctive relief (R. 1-7). After the defendants filed a responsive pleading, the parties stipulated as to the relevant facts and filed cross motions

for summary judgment (R. 20, 28, 51). The District Court granted the motion of the United States, denied that of Hewlett-Packard and entered a judgment substantially as prayed for in the complaint (R. 141-143).

Hewlett-Packard appealed upon the ground that the District Court misinterpreted the provisions of 10 U.S.C. § 2313(b) and failed to give effect to the words of the statute (and of Clause 10) which limit the records of the contractor or subcontractor which may be examined by the Comptroller General to those "that directly pertain to, and involve transactions relating to, the contract or subcontract." The Court of Appeals affirmed, stating:

> "The key word in the limitation clause is 'contract.' If that word is used in section 2313(b) only with reference to the terms and conditions of an agreement and the procedures whereby those terms and conditions were formulated, then the district court failed to give full effect to the limitation clause. As Hewlett-Packard correctly points out, under the stipulated facts summarized above, production costs were not taken into consideration in arriving at the terms and conditions of the contracts in question. Thus data pertaining to production costs could not be said to directly pertain to, and involve transactions relating to, the contract, as so defined.
>
> In our opinion, however, the word 'contract,' as used in this statute is intended to have a broader meaning, embracing not only the specific terms and conditions of the agreement, but also the general subject matter. The subject matter of these four contracts is the procurement of described property by the Government." (R. 158-159)

The Court of Appeals held that production costs directly pertained to the subject matter as thus broadly defined by the court. Petitioner contends that the interpretation thus given the word "contract" is erroneous.

REASONS FOR ALLOWANCE OF WRIT

1. The court below has decided an important question of interpretation of a major federal statute which should be settled by this Court.

The provision for examination of certain records of the contractor contained in 10 U.S.C. § 2313(b) was initially adopted by the Congress in 1951.[4] This case is the first reported case which interprets this provision and it will therefore constitute the only precedent as to the proper interpretation of this statute which is an integral and important part of the statutes regulating procurement of materials by the United States. National procurement policies have added significance under the world conditions with which the United States is presently confronted.

The provision itself is required to be included in all negotiated contracts of the United States involving more than $2,500 in amount and is a part of the standard form government contract (R. 24). The decision herein accordingly will affect every person who has negotiated, or in the future negotiates, a contract for the sale of more than $2,500 of articles to the United States.[5] To the many thousands of such persons there must also be added all subcontractors who supply more than $2,500 of items to the primary contractors, as § 2313(b) makes mandatory the inclusion of this provision in all subcontracts. For this reason, this case is of vital importance to the entire scheme of federal government contract negotiations.

The United States has recognized the importance of this question of statutory interpretation, for at the commence-

4. Public Law 81-921; 64 Stat. 1257. Codification into Title 10 United States Code occurred in 1956; Public Law 85-568; 70A Stat. 127, 133.

5. The monetary exemption was raised from $1,000 to $2,500 in 1959. See ASPR § 7-104.15, 32 C.F.R. § 7.104-15 (1960), 24 Federal Register 891.

ment of his oral argument before the District Court, the Chief of the General Litigation Section of the Department of Justice stated:

> "The Court appreciates, of course, that this is really the interpretation of a statute which applies to a great many contracts, and it is of considerable significance not only to the litigants here today, but to the interpretation of this statute in its national application." (R. Vol. II, p. 5)

An issue of this magnitude should be settled by the Supreme Court. This Court has on a number of occasions recognized the desirability of itself settling matters of interpretation of clauses in standard form government contracts which are likely to affect many contractors. For example, this Court granted certiorari to review decisions interpreting the disputes clause of a standard form government contract in *U. S. v. Moorman,* 338 U.S. 457 (1950), and *U. S. v. Wunderlich,* 342 U.S. 98 (1951); to review a decision interpreting the Walsh-Healey Act provision of a standard form government contract in *Endicott-Johnson Corp. v. Perkins,* 317 U.S. 501 (1943); and to review a decision interpreting the tax clause of a standard form government contract in *U. S. v. Glenn L. Martin Co.,* 308 U.S. 62 (1939).

As the facts are neither complicated nor in dispute, this case is one which can readily be decided by the Supreme Court without undue expenditure of the Court's time.

2. A final decision by this Court is necessary to avoid confusion in the administration of long-established United States government procurement policies.

Existing government procurement policies of long standing declare that it is the policy of the United States to rely on the disciplines of the commercial market place in

establishing reasonable contract prices for standard commercial articles (ASPR § 3-403.1, 32 C.F.R. § 3.403-1 (1960); Defense Procurement Circular No. 5, May 12, 1964).[6] These policies are reflected in and implemented by the Truth in Negotiations Act (Public Law 87-653; 76 Stat. 528) which defines the circumstances under which cost data is to be supplied to the government by the contractor and makes effective provision for the matter of reliance thereon by requiring subsequent contract price adjustment where data supplied is inaccurate, incomplete or non-current, but then provides that these requirements need not be applicable to "contracts or subcontracts where the price negotiated is based on * * * established catalog or market prices of commercial items sold in substantial quantities to the general public" (10 U.S.C. § 2306(f)). This is legislative recognition that cost data is not directly pertinent to contracts for standard commercial articles at the *time* of negotiation. This Truth in Negotiations Act would be completely inconsistent with the examination of records statute if the Comptroller General has unrestricted powers of subsequent examination, since the Congress would be saying on the one hand to the procurement agencies "you do not need to rely on cost data in procurement negotiations for standard commercial products" and on the other hand "we nevertheless expect the Comptroller General to audit and criticize the profit margins under these same contracts after performance has been completed." If profits are not a material

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6. In Senate Report 643, July 25, 1953, 3 U.S. Code Cong. & Admin. News (1954), p. 3880, the committee gave the following reasons for making the exemption of standard commercial articles from the Renegotiation Act mandatory rather than permissive:

> "The committee believes that in the case of standard commercial articles there is in most cases no basis or need for renegotiation since cost and pricing experience has already been acquired and prices made in a competitive market."

factor in the negotiation or performance of the contract, they should be of no concern thereafter.

These well established policies have led contractors to believe that they are not required to furnish the United States with cost of production data with respect to negotiated contracts based on the presence of adequate competition or established catalog or commercial market prices. Countless individuals and business firms have entered into contracts with various agencies of the United States upon the assumption that their rights of privacy for confidential data were inviolate and that their obligations of disclosure were measured by the requirements imposed as a part of the contract negotiation. This fundamental assumption is thrown into serious question by the decision of the court below which requires the contractor to make available to the United States for subsequent examination its records of the cost of producing the items sold under contracts in which the costs of production were not considered relevant when each contract itself was negotiated.

This Court should clarify the extent to which rights of privacy as to confidential business data are still preserved to contractors dealing with the United States. If the consequence of negotiating any contract with the United States involving more than $2,500 is to expose the contractor to the risk of subsequently being required to disclose his confidential costs of production, this result should be based on a decision of this Court. It is particularly desirable that this issue be settled with finality, as a result of the present decision can well be that contractors may refuse to deal with the government by negotiated contracts for items as to which the costs of production are considered confidential. Such a result could have serious repercussions upon the general procurement program.

3. The decision of the court below creates an obstacle to the performance of existing contracts with the United States.

Section 2313(b) and Clause 10 provide that the right of access to records extends to those of any subcontractor. This means that if the United States has the broad rights of subsequent inspection as determined by the court below, it can be very difficult, if not impossible, for the prime contractor to procure necessary materials to perform his contract, as the suppliers may be entirely unwilling to make their books and records available to the United States as a condition of furnishing materials to the prime contractor.

The situation of the subcontractor is rendered especially uncertain by the decision of the court below as the requirements of § 2313(b) and Clause 10 extend to all subcontractors even though that clause is not actually contained in those particular contracts. *Paul v. United States,* 371 U.S. 245, 255 (1962); *G. L. Christian & Associates v. United States,* 320 F.2d 345, 350-351 (Ct. of Clms, 1963); certiorari denied 375 U.S. 954. Accordingly, a subcontractor who is not even aware of his exposure may be subject to these broad rights of investigation.

4. The decision of the court below holds that there are vested in the Comptroller General extensive investigative powers which can strip away the confidential status afforded business data by the provisions of 18 U.S.C. § 1905.

Rights of privacy with respect to confidential business data are extremely important in a competitive society. The Congress of the United States has recognized both the importance and the confidential nature of vital business data by prohibiting its disclosure by any officer or employee of the United States or any department or agency thereof. See 18 U.S.C. § 1905 which is set out in Appendix A, *infra* at pp. 3-4. The Comptroller General does not recognize the provisions

of this statute as being applicable to him and asserts that his investigative powers are not subject to the restraints of this statute as he is a part of the investigative arm of the Congress itself. Accordingly, the Comptroller General is in a position to disclose publicly the results of his investigation and thereby frustrate the confidentiality afforded by § 1905. This circumstance strongly suggests that the limits (or absence thereof) of such broad investigative powers should be determined by the Supreme Court.

5. The court below erroneously interpreted the key word "contract" and thereby reached a wrong conclusion which should be corrected by this Court.

The decision of the court below recognizes that:

> "The key word in the limitation clause is 'contract.' If that word is used in section 2313(b) only with reference to the terms and conditions of an agreement and the procedures whereby those terms and conditions were formulated, then the district court failed to give full effect to the limitation clause. As Hewlett-Packard correctly points out, under the stipulated facts summarized above, production costs were not taken into consideration in arriving at the terms and conditions of the contracts in question. Thus data pertaining to production costs could not be said to directly pertain to, and involve transactions relating to, the contract, as so defined.
>
> In our opinion, however, the word 'contract,' as used in this statute is intended to have a broader meaning, embracing not only the specific terms and conditions of the agreement, but also the general subject matter. The subject matter of these four contracts is the procurement of described property by the Government." (R. 158-159)

This statement is the crux of the present controversy. Petitioner submits that the word "contract" as used in § 2313(b)

is to be interpreted in accordance with customary usage of the English language and in context can only mean the specific negotiated agreement between the parties—the word should not be expanded by the process of interpretation to encompass the general subject matter of procurement of property by the government.

"Contract" is a term of ordinary usage which has long had the generally accepted meaning of a legally enforceable agreement between two or more parties. The most often quoted definition is based on Blackstone's Commentaries (2 Blackstone, Commentaries 442) and as phrased by the Supreme Court is as follows:

> "A contract is defined by all to be an agreement to do, or not to do, some particular act; * * *" *Ogden v. Saunders,* 12 Wheat. 213, 256 (1827)

This is likewise the definition recognized in standard dictionaries, as Webster's New Third International Dictionary defines the noun "contract" as:

> "* * * 1 a: an agreement between two or more persons or parties to do or not to do something: BARGAIN, COMPACT, COVENANT; *esp:* an agreement that is legally enforceable * * *"

The Armed Services Procurement Regulation as in effect when the contracts here involved were executed contained a definition of the word in the plural as follows:

> "1-201.6 *Contracts* means all types of agreements and orders for the procurement of supplies or services. It includes awards and preliminary notices of award; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job orders, task orders, or task letters thereunder; letter contracts, letters of intent, and purchase orders. It also includes amendments and supplemental agreements with respect to any of the foregoing." 32 C.F.R. § 1.201-6 (1954)

As used in this Regulation, the word "contract" plainly referred to a specific agreement.

The basic requirement of § 2313(b) itself is that "*Each contract negotiated* under this chapter shall *provide*" for the examination of records directly pertaining to "*the* contract." (Emphasis supplied.) The agreement between the parties is the only subject matter which can be "negotiated" and in which a specific provision can be inserted so there can be no doubt that "*the* contract" means the specific and restricted subject matter which comprises the agreement between the parties.

Clause 10, upon which the Government is basing its demands for inspection of records in this case, is itself simply part of the "General Provisions" of a "Supply Contract" (Standard Form 32). By its terms this clause becomes applicable only to a specific agreement which meets certain qualifications, as the clause provides:

> "10. EXAMINATION OF RECORDS
>
> (The following clause is applicable if *the amount* of *this contract* exceeds $1,000 and *was entered into* by means of negotiation, but is not applicable if this contract was entered into by means of formal advertising.)" (Emphasis supplied.)

The government contract form is replete with references to "this contract" and its identity as a separate and specific agreement is emphasized by the qualification as to dollar amount and the use of the words "entered into". This is the language of specific agreement and is consistent only with the concept that the word "contract" means the negotiated agreement between the parties. Such a specific agreement has definite terms and conditions which can be interpreted in the light of the intention of the parties. This is the natural and usual meaning of the term "contract" and is therefore the meaning which must be given to that term when it is used in § 2313(b) and Clause 10.

Such rights of examination of records as the government may have are solely based on the fact that Hewlett-Packard has entered into a "contract" with the government—there are otherwise no rights of examination—and this fact points directly at the negotiated agreement as the significant subject matter.

There is simply no basis for an expansion of the meaning of the word "contract" to include "the general subject matter" of "the procurement of described property by the government." The practical result of this expansion is that no effective restraint has been imposed upon the rights of examination conferred upon the Comptroller General and the limitation clause in substance has been deleted from the statute. Such expansion is legislation—not valid interpretation. But this unsupportable interpretation is the basis of the decision of the court below. If the word "contract" had been given its normal and usual meaning, then as stated in its decision the court below would have been compelled to conclude that:

> "* * * the district court failed to give full effect to the limitation clause. As Hewlett-Packard correctly points out, under the stipulated facts summarized above, production costs were not taken into consideration in arriving at the terms and conditions of the contracts in question. Thus data pertaining to production costs could not be said to directly pertain to, and involve transactions relating to, the contract, as so defined." (R. 158-159)

This conclusion was avoided only by the extraordinary interpretation placed upon the key word "contract".

It is important to emphasize that under the facts of this case, the contracts involved relate only to standard commercial articles sold in substantial quantities to the general public. The petitioner recognizes that there are many con-

tracts negotiated by government contracting agencies where there is no established public market price and the negotiation procedure is therefore likely to include both consideration of and reliance on estimated costs of production. In those types of contracts costs of production can be directly pertinent to the particular contracts, for the determination of what is directly pertinent and involves transactions relating to specific contracts can only be made upon the basis of the facts concerning the negotiation of those contracts, their subject matter and their performance. In the instant case, the stipulated facts demonstrate that Hewlett-Packard's costs of production were not considered in the course of the contract negotiation, were not relied upon in any way by the contracting officers of the Air Force and are not now germane to a determination of whether those contracts have been performed in accordance with their terms. It was therefore erroneous to give to the Comptroller General the right to examine any records of Hewlett-Packard relating to the costs of production or margins of profit on these four contracts. This error results from an incorrect interpretation of the key word "contract" in 10 U.S.C. § 2313(b) and this Court should grant a hearing in order that the words of this important statute may be given their usual and customary meaning.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendices Follow)